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SUPREME COURT, U.S.

116

No. (3) 08A391
08-570

In The Supreme Court of the United States

Philip J. Berg, Esquire,

Petitioner,

vs.

Barack Hussein Obama, Jr., *et al.*,

Respondents.

PETITIONER'S SUPPLEMENTAL ARGUMENT FOR APPLICATION FOR AN EMERGENCY TEMPORARY INJUNCTION PENDING RESOLUTION OF THE PETITION FOR WRIT OF CERTIORARI

To the Honorable David H. Souter, Justice of the United States and Circuit Justice for the Third Circuit:

NOW COMES the Petitioner, Philip J. Berg, Esquire, hereby submitting this Supplemental Argument in support of his Emergency Motion for an staying the Presidential Election of November 4, 2008, until resolution of the Petition for Writ of Certiorari Before Judgment. As grounds for this Application, Petitioner avers as follows:

I. REQUEST FOR EMERGENCY RELIEF

1. A Petition for Writ of Certiorari Before Judgment, pursuant to the U.S. Supreme Court Rules, specifically Rule 10 and Rule 11, was filed October 30, 2008 in this Court. Petitioner appealed from the United States Court of Appeals

for the Third Circuit from his appeal of the U.S. District Court, Eastern District of Pennsylvania Memorandum and Order dated October 24, 2008.

2. Petitioner filed an Application addressed to the Honorable David H. Souter for an Emergency temporary Injunction Staying the Election, which is November 4, 2008, until Petitioner's Writ of Certiorari filed with this Court is heard and resolved.

3. Petitioner filed for an emergency temporary Injunction to the Third Circuit Court of Appeals on October 30, 2008 (C.A. No. 08-4340) requesting a temporary injunction staying the Presidential election scheduled to take place November 4, 2008 until the issues on appeal with the Third Circuit are heard and/or resolved.

4. The Third Circuit Court of Appeals Justices Ambro and Jordon denied Petitioner's motion for an emergency temporary Injunction on October 31, 2008 claiming Petitioner did not have Standing. A true copy of Justice Ambro and Jordan's Order is attached hereto as **EXHIBIT "A".**

5. The standing issue is the reason for the Appeal.

A. The Standing Issue, which this Court Alone Can Dispel.

The very essence of civil liberty, wrote Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. 137 (1803), certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. Against the backdrop of historical Supreme Court precedent beginning with *Marbury* and extending through *Sprint Communications Co. L.P. v. APCC Services*

Inc., __ U.S. __, 128 S.Ct. 2531 (2008), the better-informed "test" for the injury-in-fact prong of the standing doctrine analysis more resembles a "sliding scale" of factors and variables operating as a function of the speculative nature and/or remoteness of the allegations. *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Federal Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998); *Sprint Communications Co. L.P. v. APCC Services Inc.*, __ U.S. __, 128 S.Ct. 2531 (2008); *Friends of the Earth v. Laidlaw Environmental Services Inc.*, 528 U.S. 167, 184 (2000).

In *Morton*, this Court held that the environmentalist Petitioners had standing, as injury to "aesthetic and environmental well-being" was enough to adequately constitute personal "stake" and injury in fact. 405 U.S. at 734. Subsequently, in *Hunt*, this Court held that despite a lack of personal "stake," an association has standing to bring suit so long as the interests in question are relevant to the organization's purpose and regardless of whether the claims asserted or relief requested involve the individual members of the organization. 432 U.S. at 343. Furthermore, in *Laidlaw*, a case stemming from noncompliance with the Clean Water Act, this Court noted the importance of a Petitioner's demonstration of standing but followed up by stating that, "it is wrong to maintain that citizen Petitioners facing ongoing violations never have standing to seek civil penalties." 528 U.S. at 184. More recently, in *Akins*, this Court rendered a decision

maintaining that individual voters' inability to obtain alleged public information met the injury in fact requirement, as it helped to ensure that the Court will adjudicate "a concrete, living contest between adversaries." 524 U.S. at 21. Similarly and finally, in *APCC*, decided by this Court in June 2008, the conventional, "personal stake" approach promulgated in cases such as *Lujan* and Baker gave way to the idea that the "personal stake" requirement and the three requirements of standing — injury in fact, causation and redressibility — are "flip sides of the same coin" and are simply two different ways of ensuring that each case or controversy presents "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *APCC*, 128 S.Ct. at 2543.

The case at hand may lack the specificity of injury in fact required by Lujan, but the allegations from which the action arises are no more speculative or remote than the importance of environmental aesthetics of *Morton* or the party disconnect evident in *Hunt*. The foundation of the claims presented by Mr. Berg, the will to avoid a certain constitutional crisis, certainly amount to a "personal stake," but in the case that this Court may deem otherwise, the underlying claims absolutely present the adversarial contest under which standing was found in the recent decisions in *Akins* and *APCC*.

Without a doubt, the Respondents will note that the premise behind *Akins* was the failure to obtain information, and will attempt to distinguish *APCC* because it involves standing in the context of contracts, assignors and assignees. However,

Mr. Berg has indeed sought information vital to the election process put forth in the U.S. Constitution, and this Court in *APCC* stated that, apart from historical precedent for permitting suits by assignees under assignments for collection, "[i]n any event, we find that the assignees before us satisfy the Article III standing requirements articulated in more recent decisions of this Court." Furthermore, this Court's treatment of the standing doctrine in *APCC* should be enough to show that the reasoning exhibited by the district court judge, grounded in *Lujan*, misperceives the three prongs of standing as enunciated just four months ago by this Court.

Therefore, because of the reasons stated above, because of the "sliding scale" nature of a "test" for injury in fact, because the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury, this Court should hold that Mr. Berg has standing to prosecute this action.

B. A Case the District Court Cited in Denying Standing to Petitioner Supports Granting Petitioner's Motion Requesting a Temporary Injunction Staying the Presidential Election.

In *Jones v. Bush* , 122 F. Supp.2d 713 (N.D. Tex.), affirmed without opinion, 244 F.3d 134 (5th Cir. 2000), plaintiffs requested a preliminary injunction to prevent the Texas electors from casting their votes in favor of defendant candidates because of alleged violation of the Twelfth Amendment of the Constitution. The Court denied the request for injunctive relief because plaintiffs failed to demonstrate a substantial likelihood of success on the merits of their claim that the defendant Vice-Presidential candidate was an inhabitant of the state of Texas during the

relevant period. Id., at 715. On the basis of this case, the District Court Judge erred when he failed to consider the likelihood of success on the merits.

Further, in *Robinson v. Bowen*, 2008 U.S. Dist. LEXIS 82306 (N.D. Cal. Sept. 16, 2008) the plaintiff moved for an order to remove Senator McCain from the California ballot in November because he alleged that McCain was not a "natural born citizen" and was therefore ineligible to serve as President. The court reviewed the order and stated:

> "This order finds it highly probably, for the purposes of this motion for provisional relief, that Senator McCain is a natural born citizen. Plaintiff has not demonstrated the likelihood of success on the merits necessary to warrant the drastic remedy he seeks." Id., at *3.

In Petitioner's case herein, both the District Court and the Third Circuit Court of Appeals clearly erred in denying injunctive relief without reviewing the likelihood of success on the merits of the case. Further, based on overwhelming evidence that Obama is not a natural born citizen of the United States, Petitioner would likely succeed on the merits of the case and should be granted a temporary Injunction Staying the Presidential Election.

C. Defendants Obama and the DNC made promises that clearly Fall Under Promissory Estoppel

Barack Obama and the DNC made promises to the Petitioner and to the American people, reasonably expecting — in fact, counting on the idea — that the promises would induce reliance, those promises induced the Petitioner to expend money and billable hours and the American public to donate more than $600 million

to Obama's campaign, and injustice can only be avoided by adjudication in this Court.

A cause of action under promissory estoppel arises when a party relies to his detriment on the intentional or negligent representations of another party, so that in order to prevent the relying party from being harmed, the inducing party is estopped from showing that the facts are not as the relying party understood them to be. *Thomas v. E.B. Jermyn Lodge No. 2*, 693 A.2d 974, 977 (Pa. Super. 1997) (citing *Rinehimer v. Luzerne County Community College*, 539 A.2d 1298, 1306 (Pa. Super.), app. denied, 555 A.2d 116 (1988)). Promissory estoppel is applied to enforce a promise which is not supported by a binding contract. *Carlson v. Arnot-Ogden Mem'l. Hosp.*, 918 F.2d 411, 416 (3d Cir. 1990) (holding promissory estoppel is unwarranted in light of court's finding that parties formed an enforceable contract); *Bosum Rho v.Vanguard OB/GYN Assocs., P.C.*, No.Civ.A.98-167, 1999 WL 228993, at *6 (E.D.Pa. Apr. 15, 1999).

With regard to the doctrine of promissory estoppel, it is manifested, and not actual, intent which is paramount. The question is not what Obama and the DNC actually intended, as Judge Surrick claimed in his Memorandum, but rather what the Petitioner and the American public, as promises, were justified in understanding that intent to be. There is no sound reason to suffer the harms in question because the U.S. District Court, Eastern District of Pennsylvania incorrectly dismissed the Promissory Estoppel claim. Judge Surrick claimed the DNC's promises were not actually promises but instead of statement of intentions.

Judge Surrick went on further claiming, "The 'promises' that Petitioner identifies are statements of principle and intent in the political realm. They are not enforceable promises under contract law. Indeed, our political system could not function if every political message articulated by a campaign could be characterized as a legally binding contact enforceable by individual voters. Of course, voters are free to vote out of office those politicians seen to have breached campaign promises and Federal courts, however, are not and cannot be in the business of enforcing political rhetoric."

The DNC and Obama made promises in writing which were posted on their website to lure people to donate money based on their promises. The DNC named this document "Renewing America's Promise," which presents the 2008 Democratic National Platform. In this document, the DNC promises among other things "use technology to make government more transparent, accountable and inclusive," "maintain and restore our Constitution to its proper place in our government and return our Nation to the best traditions, including their commitment to government by law" and "work fully to protect and enforce the fundamental Constitutional right of every American vote — to ensure that the Constitution's promise is fully realized".

Obama placed on his website and stated on national television his promise to open and honest Government and his promise to truthfully answer any questions asked of him.

As a result of his detrimental reliance on these promises, Petitioner donated money and billable hours to Democratic Presidential candidates as well as the Democratic National Committee.

The DNC did in fact break promises by promoting an illegal candidate to run for and serve, if elected, as President of the United States, clearly in violation of the United States Constitution and in violation of their promise to enforce the fundamental Constitutional rights of every American voter. Furthermore, Obama has not answered, in an honest manner, questions about his citizenship. Moreover, Obama has breached his promise to uphold our Constitution; Obama is a Constitutional lawyer and teacher and is well aware he is ineligible to serve as the President of the United States. This is hardly an example of being open and honest, this is hardly an example of open and honest government, and it is neither the way to uphold our United States Constitution, nor the Oath of Office taken by Obama.

D. The District Court's Dismissal of the Action for Lack of Jurisdiction and the Error was by no Means Harmless Beyond a Reasonable Doubt Because the Outcome Would have been Different Save for the Erroneous Dismissal.

The district court erred in dismissing the action on grounds that it was not one within the jurisdiction of the court, as it directly involved the construction and application of the United States Constitution, and such an error cannot be deemed harmless beyond a reasonable doubt as the outcome of the case would likely have been different save for the erroneous dismissal. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Swafford v. Templeton*, 185 U.S. 487, 491 (1902). While *Chapman*

involved a case which arose from jury nullification and Fifth Amendment issues, this Court nonetheless placed emphasis on the intention of the harmless-error standard to not treat as harmless constitutional errors which affected the "substantial rights" of a party, and held that before a constitutional error may be deemed harmless, the Court must be capable of discerning that it was harmless beyond a reasonable doubt, and the burden of proof falls on the non-prejudiced party to do so. 386 U.S. at 24. Furthermore, in *Swafford*, this Court held that an action brought in federal court cannot be dismissed for want of jurisdiction, no matter the perceived lack of merit of the averments within, when the very heart of the controversy arises from a guideline put forth by America's founders and guaranteed by the constitution and, therefore, is very much a federal question. 105 U.S. at 493.

In this case, citing the criteria put forth by this Court in *Chapman*, the district court's error in dismissing Mr. Berg's action for lack of proper jurisdiction must not be considered harmless beyond a reasonable doubt as, without the improper dismissal, the outcome of the case would have likely been different. Furthermore, considering the guidelines put forth by this Court in *Swafford* and the mere fact that Mr. Berg's allegations arise from Article II, Section 1 of the United States Constitution, the action improperly dismissed by the district court runs to the very heart of the requirements and guidelines and ideas and ideals put forth by the framers of America's founding documents and is, therefore, very much a federal question and well within the jurisdiction of the district court.

For the aforementioned reasons, the district court's error in dismissing Mr. Berg's action on grounds of lack of jurisdiction was by no means harmless beyond a reasonable doubt. Therefore, this Court should reverse the decision rendered by the United States District Court for the Eastern District of Pennsylvania and here the merits of the case.

E. Petitioner as well as all United States Citizen Voters have Suffered Injury in Fact and Will Continue to Suffer if the Presidential Election is not Stayed Pending the Resolution of Obama's Citizenship and Eligibility to hold the Highest Officein the United States.

It is imperative the Presidential election on November 4, 2008 be stayed pending resolution of Obama's citizenship status and eligibility to hold the Office of President of the United States. The damage to Petitioner and all democratic voters will continue occurring if Obama is elected and allowed to take the position of President of the United States without any type of verification.

If Obama is elected as President of the United States and it is later discovered he is not a "natural born" and/or "natural" citizen of the United States, Petitioner and all Democratic citizen voters will be deprived of their right to cast their vote for a qualified and eligible candidate. Their votes will be deemed void if this occurs. Moreover, if Obama would prove his citizenship status, the Presidential election would continue on. However, Obama has refused. Obama is the only person who holds the power to resolve these issues, he is the only party who can access his birth records, but again he has refused. At this point, if Obama is forced to step down off the ballot, there is time for a qualified and eligible Democratic

candidate to fill the position. Thus, Petitioner and all Democratic Voters would have a party to cast their votes on.

Petitioner has been damaged financially for all monies donated, billable hours spent supporting the Democratic candidates, taxes paid by Petitioner that went to the Secret Service for their protection of Obama for the past twenty-one (21) months and for the financial costs and time expended for this litigation, when Defendants could have very easily investigated, verified and obtained proof of Obama's eligibility to serve as President of the United States, if in fact he is eligible.

Petitioner has suffered damage to his reputation and discrimination as a result of attempting to protect his rights and verify the eligibility of Obama to serve as President of the United States. Petitioner has been repeatedly called a racist and verbally assaulted for bringing forward this lawsuit against Obama. Petitioner is not a racist and in fact, is a paid Life Member of the NAACP.

Petitioner has attempted to obtain the verification and proof requested herein by way of Request for Admissions and Request for Production of Documents served upon Defendants and Subpoenas served upon agencies who could supply the documentation to prove Obama's citizenship status. To date, Petitioner has not received anything with the exception that on October 15, 2008, Obama and the DNC never answered or objected to the Request for Admissions and they are therefore deemed admitted pursuant to Federal Rules of Civil Procedure, Rule 36.

If Petitioner's Motion for Emergency temporary Injunction is denied and the election proceeds without adequate disclosure concerning Obama's citizenship status, Petitioner will have been deprived of information that is extremely important for voting and will suffer irreparable harm. In *Fec v. Akins*, 524 U.S. 11, 21 (1998), the Supreme Court held that if a party is denied information that will help in making a voting decision that party is obviously injured in fact. Defendants have failed to produce Obama's original vault birth certificate to prove Obama's citizenship status in the face of Petitioner's Discovery and even moved for a Protective Order to block such discovery requests. Since Petitioner cannot cast an informed and meaningful vote he has and will continue to suffer irreparable harm unless this Court grants an Emergency Restraining Order staying the election at least until such information is disclosed.

Petitioner's rights guaranteed under the Liberty clause of the Fourteenth (14th) Amendment of the United States Constitution have already been violated. It has been announced in the main stream media that Obama's "briefing" has already begun into our National Secrets, our Nations Top Secrets, which Obama is not privy too and in violation of our National Security, as Obama is not qualified and/or eligible to serve as President of the United States. This has placed Petitioner and other citizens of the United States in grave danger. Petitioner's Liberty as guaranteed will further be violated if Obama is allowed to be voted into and assume the position of President of the United States; Petitioner will be further damaged and is in serious jeopardy.

Petitioner is forced to live with the consequences if an ineligible candidate is elected and allowed to serve as President of the United States. It will alter the United States Constitution without proper due process of law. It will set precedence and further violations of our United States Constitution will continue without due process of law and our rights secured by the United States Constitution will no longer protect citizens of the United States.

Irreparable harm would likely flow from a denial of injunctive relief because a subsequently invalidated election is likely to be very disruptive. *Lucas v. Townsend*, 100 L. Ed. 2d 589 (1988). Therefore, Petitioner's Application for a temporary Injunction staying the Presidential Election set to take place November 4, 2008 should be granted.

F. CONCLUSION

For the above aforementioned reasons, Petitioner, Philip J. Berg, Esquire, prays this Honorable Court will grant his Application and issue a temporary Injunction staying the Presidential election.

Respectfully submitted,

Dated: November 3, 2008

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No. 08-570

In The Supreme Court of the United States

Philip J. Berg, Esquire,

Petitioner,

vs.

Barack Hussein Obama, Jr., *et al.*,

Respondents.

CERTIFICATE OF SERVICE

I, Philip J. Berg, Esquire, hereby certify that Petitioner's Supplemental Argument in support of his Application to Justice David H. Souter, United States Supreme Court for the Third Circuit for a temporary Injunction staying the Presidential Election of November 4, 2008 pending the resolution of Petitioner's Writ of Certiorari was served upon the following Defendants via First Class Mail, postage fully prepaid, this 3rd day of November 2008.

Benjamin A. Streeter, III, Esquire
The Federal Election Commission (FEC)
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Washington, D.C. 20463 In *Pro Se*

Secretary of the Commonwealth,
Pennsylvania Department of State,
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CERTIFICATE OF SERVICE, Continued

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Diane Feinstein,
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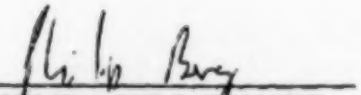

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATIONS

I, Philip J. Berg, Esquire, Petitioner and a member of the Bar of this Court, certify that the Application for an Emergency temporary Injunction to Stay the Presidential Election pending resolution of the Petition for Writ of Certiorari contains 3,479 words excluding the parts of the Application that are exempted.

Dated: November 3, 2008

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EXHIBIT "A"

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

October 30, 2008
ECO-9

No. 08-4340

PHILIP J. BERG, Appellant

v.

BARACK HUSSEIN OBAMA, et al.

(E.D. Pa. No. 08-cv-4083)

PRESENT: **AMBRO** and **JORDAN**, Circuit Judges

1) Emergency Motion by Appellant Philip J. Berg for an Immediate Injunction To Stay the Presidential Election of November 4, 2008 Pending Resolution of the Petitioner's Appeal;

2) Response on behalf of Appellee Barack Obama with Exhibits to Appellant's Motion for Injunction To Stay the Presidential Election of November 4, 2008;

3) Response on behalf of Appellee Federal Election Commission with Exhibit to Motion for an Immediate Injunction To Stay the Presidential Election of November 4, 2008.

Carolyn Hicks, Case Manager
267-299-4926

ORDER

Plaintiff-Appellant's Emergency Motion for an Immediate Injunction To Stay the Presidential Election of November 4, 2008 Pending Resolution of the Petitioner's Appeal is hereby

(Continued)

ORDER

DENIED. For the reasons ably expressed by the District Court—and not addressed in Plaintiff-Appellant's Emergency Motion—it appears that Plaintiff-Appellant lacks standing to challenge Senator Barack Obama's candidacy for the Presidency of the United States. Accordingly, Plaintiff-Appellant has not shown a likelihood of success with respect to his appeal.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: October 31, 2008

cc: Philip Berg, Esq.
John P. Lavelle, Jr., Esq.
Benjamin A. Streeter, III, Esq.